Supreme Court, U.S.
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No. 91-1861

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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ANTHONY CALDWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court committed plain error in admitting petitioner's confession because the police officer who advised petitioner of his *Miranda* rights informed petitioner of his right to appointed counsel without advising him specifically of his right to consult with a lawyer before questioning and to have a lawyer present during questioning.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 954 F.2d 496.

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 1992. A petition for rehearing was denied on February 18, 1992. Pet. App. A40. The petition for a writ of certiorari was filed on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 121 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A28.

1. On January 7, 1990, Barbara Johnson opened a package addressed to "Bob Johnson" that had been delivered to her grandmother's apartment. Inside the package, Barbara Johnson found a clear plastic bag containing a white, powdery substance. Johnson took the package upstairs to her own apartment and called petitioner's mother, Vivian Jones, who lived in the same four-family flat as Johnson and Johnson's grandmother. Vivian Jones came to Barbara Johnson's apartment and examined the package. Jones then called petitioner to come to the apartment. When petitioner arrived, Jones showed him the package and asked whether he was expecting it. Petitioner admitted that he was and left the apartment. Pet. App. A2.

Jones and Johnson sought advice from Johnson's friend Mike Washington, a St. Louis police officer. Washington came to Johnson's apartment, looked at the package, and suspected that it contained narcotics. Washington requested that Detective Albert Upchurch come to the apartment to examine the package. Pet. App. A2.

While Washington was in Barbara Johnson's apartment, petitioner called Vivian Jones at her apartment. Washington then went to Jones's apartment and spoke with petitioner on the telephone, telling petitioner that he should return to Johnson's

apartment and that if he did not return, he would "probably be in a lot of trouble." Pet. App. A2-A3.

Petitioner returned to Johnson's apartment, where Washington questioned him about the package. Washington did not advise petitioner of his *Miranda* rights. Petitioner told Washington that a man named "Ray" had promised him $500 if he would agree to accept delivery at his address of a package containing cocaine. Washington informed petitioner that he had contacted Detective Upchurch, and he advised petitioner that it would be in his best interest to cooperate with Upchurch. Pet. App. A3.

When Upchurch arrived, Washington led him to the kitchen where petitioner was seated. Petitioner, who was 18 years old, was nervous and upset, as was his mother, who was also present in Johnson's apartment. Upchurch looked at the package and concluded that it contained crack cocaine. After Washington introduced Upchurch to petitioner, Upchurch immediately advised petitioner of his *Miranda* rights. Upchurch told petitioner:

> You got the right to remain silent. Anything you say will and can be used against you in the court of law. You have a right for an attorney. If you can't afford one, one will be appointed to you.

Upchurch then asked petitioner whether he understood his rights. Petitioner nodded his head to indicate that he did. Petitioner and Upchurch moved to the living room, where Upchurch again asked petitioner, "You sure you understood your rights?". Petitioner responded that he did. Upchurch then asked petitioner about the package, and petitioner repeated that he had agreed to accept delivery of the cocaine at his address. Pet. App. A3-A4.

Upchurch placed petitioner under arrest and took him to the narcotics office of the St. Louis Police Department. There, Upchurch again advised petitioner of his *Miranda* rights and asked petitioner if he understood those rights. Petitioner said that he did. In response to questions, petitioner repeated the statements he had given earlier. Pet. App. A4.

2. Petitioner moved to suppress his statements to Officer Washington and Detective Upchurch, claiming that "[a]t no time during or prior to the interrogation was [petitioner] apprised and informed of his constitutional rights to an attorney and against self-incrimination as required under *Miranda* v. *Arizona*, 384 U.S. 443 (1966)." Pet. App. A7 n.5. The district court referred the suppression motion to a magistrate. After conducting an evidentiary hearing, the magistrate recommended that petitioner's statements be suppressed. Pet. App. A31-A39. The magistrate concluded that petitioner was in custody when Officer Washington began questioning him and that petitioner's statements to the officer must be suppressed because of Washington's failure to advise petitioner of his *Miranda* rights. Pet. App. A36-A37. The magistrate also recommended that petitioner's statements to Detective Upchurch be suppressed, stating that although Upchurch "properly advised [petitioner] of his *Miranda* rights," petitioner "did not voluntarily and intelligently waive his rights" because of his upset mental state, his mother's upset condition, and his youth and inexperience. Pet. App. A37-A38.

The district court adopted the magistrate's recommendation that petitioner's statements to Officer Washington be suppressed. Pet. App. A29. But the court rejected the magistrate's recommendation that petitioner's statements to Detective Upchurch be

suppressed, observing that Upchurch "three times advised [petitioner] of his constitutional rights and asked if [petitioner] understood them." Pet. App. A29. The court stated that

> these circumstances do not "rise to the level of compulsion or coercion to speak," *Illinois* v. *Perkins*, * * * 110 S.Ct. 2394, 2397 (1990), and so "are not within *Miranda*'s concerns." *Id.* Moreover, "[t]he prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected. . . . The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' "

Pet. App. A30 (quoting *Duckworth* v. *Eagan*, 492 U.S. 195, 203 (1989)).

3. In the court of appeals, petitioner contended that the district court should have suppressed his statements to Detective Upchurch because Upchurch failed to advise him of his right to consult with a lawyer before questioning and to have a lawyer present during questioning. Pet. App. A5. The court of appeals found that petitioner had not raised that issue in the district court. Pet. App. A6-A8. The court noted that although petitioner raised a general *Miranda* claim in his motion to suppress his statements, he failed to point out the inadequacies in the *Miranda* warnings given by Detective Upchurch, and that neither the magistrate nor the district court had addressed the adequacy of the warnings. The court of appeals also observed that after the district court rejected the magistrate's recommendation that petitioner's statements to Detective Upchurch be suppressed, petitioner failed to renew his objection to

the admission of the statements before the district court. Pet. App. A6-A7. Accordingly, the court concluded that "we may review [petitioner's] complaint about the adequacy of *Miranda* warnings on appeal only for plain error." Pet. App. A8.

The court held that the *Miranda* "warning provided [by Detective Upchurch] does not rise to the level of plain error." Pet. App. A14; see Pet. App. A11. The court "assume[d] for purposes of this appeal that [petitioner] was in custody at the time he returned to Johnson's apartment." Pet. App. A6. The court observed that Upchurch "advised [petitioner] that he had the right to a court-appointed attorney" and "did not link [petitioner's] right to an attorney to a future point in time after police questioning." Pet. App. A14. The court concluded that "the general warning that [petitioner] had the right to an attorney, which immediately followed the warning that he had the right to remain silent, could not have misled [petitioner] into believing that an attorney could not be present during questioning." Pet. App. A14-A15.

The court also noted that "it is not entirely certain that [petitioner] was not informed of his right to an attorney before and during his interrogation at the police station." Pet. App. A14 n.11. The court explained that another detective had been present during the questioning of petitioner at the police station and had testified that Upchurch read petitioner his rights from the police waiver form. *Ibid.*

Judge Lay dissented. Pet. App. A17-A28. He concluded that petitioner "did raise the adequacy of the *Miranda* warning in his motion to suppress"; he therefore disagreed with the majority's decision to apply the plain error standard. Pet. App. A27. Judge Lay further concluded that petitioner's statements to Detective Upchurch should have been suppressed

because he "was not informed that he had a right to consult with a lawyer *before* questioning and to have a lawyer present during questioning [and] clearly could not make an intelligent and knowing waiver of rights of which he was not aware." Pet. App. A19.

## ARGUMENT

Petitioner contends (Pet. 8-16) that the officers who questioned him failed to advise him of his right to consult with counsel before questioning and to have counsel present during questioning, and that consequently he did not knowingly and intelligently waive his *Miranda* rights. That contention merits no further review.

Petitioner did not raise the issue of the alleged deficiencies in the *Miranda* warnings before the district court. Consequently, petitioner's claim is subject to the plain error rule. See Fed. R. Crim. P. 52(b). That rule permits reversal only of "particularly egregious errors * * * so 'plain' the trial judge and prosecutor were derelict in countenancing [them], even absent the defendant's timely assistance in detecting [them]." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *United States* v. *Young*, 470 U.S. 1, 15 (1985) (plain error rule can be used to correct only errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings") (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).[1]

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[1] Although petitioner asserts (Pet. 16-18) that he raised the issue of the adequacy of the *Miranda* warnings in his motion to suppress his statements, neither the magistrate nor the district court considered that issue. Moreover, the court of appeals reviewed the record of the proceedings in the district court and concluded that petitioner had "raised a general issue as to the *Miranda* warnings" but had "failed to explain why the

Any defect in the warnings petitioner received did not rise to the level of plain error. First, *Miranda* warnings may not have been required at all, because it is not apparent that petitioner was in custody when he was questioned at Johnson's apartment. Petitioner returned to the apartment voluntarily and remained there after he learned that Officer Washington had contacted Detective Upchurch. Upchurch questioned petitioner in the living room of the apartment, in the presence of petitioner's mother. Petitioner was not told that he could not leave, and he was not subject to any physical restraint. Thus, it is far from clear that petitioner was subject to a " 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977)).

Second, even if *Miranda* warnings were required, the court of appeals correctly held that the warnings petitioner received were not so inadequate as to require reversal under the plain error standard. This Court has made clear that " 'the "rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,' and that 'no talismanic incantation [is] required to satisfy its strictures.' " *Duckworth* v. *Eagan*, 492 U.S. 195, 202-203 (1989) (quoting *California* v. *Prysock*, 453 U.S. 355, 359 (1981)); see also *Duckworth*, 492 U.S. at 203 ("Reviewing courts * * * need not examine *Miranda*

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warnings were inadequate or specifically complain that Upchurch failed to inform [petitioner] of his right to counsel before or during interrogation." Pet. App. A6-A7. That fact-bound determination is reasonable and merits no further review.

warnings as if construing a will or defining the terms of an easement."). The general warning petitioner received concerning his right to appointed counsel followed immediately after warnings as to the right to remain silent and the risk of forgoing that right. There was nothing in the warning that petitioner was given that would have suggested to petitioner that he did not have a right to counsel before and during the contemplated questioning. Because petitioner was not misled by the warning concerning his right to appointed counsel, there was no plain error.[2]

Third, even assuming that the warnings petitioner received at Johnson's apartment were inadequate to advise him of his right to counsel before and during questioning, it is not clear that suppression of the statements petitioner made at the police station would be required. As the court of appeals noted, Pet. App. A14 n.11, there was testimony at the suppression hearing that Detective Upchurch read petitioner his rights from a police waiver form before questioning him at the police station. Thus, the record suggests that petitioner confessed after receiving complete and accurate *Miranda* warnings. Cf. *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985).

Fourth, petitioner does not contend that his waiver of *Miranda* rights was coerced. In these circumstances, the admission of petitioner's statements, made after he was advised of his right to remain silent

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[2] Petitioner's claim (Pet. 11) that the decision in this case conflicts with *California* v. *Prysock*, *supra*, is mistaken. The Court stated in *Prysock* that courts have "examined the warnings given to determine if the reference to the right to appointed counsel was linked with some future point in time after the police interrogation." 453 U.S. at 360. The warnings petitioner received contained no suggestion that counsel would be appointed for him only after the police questioned him.

and his right to court-appointed counsel, did not result in a miscarriage of justice. See *United States* v. *Frady*, 456 U.S. at 163 n.14 (the plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result").

Petitioner contends (Pet. 11-13) that the decision in this case conflicts with decisions of other courts of appeals, but he cites no case in which the admission of a defendant's statement after an inadequate *Miranda* warning was held to be plain error. In the one case petitioner cites in which the issue of the adequacy of the *Miranda* warnings was not raised in the district court, the court of appeals affirmed the defendant's conviction, finding "[n]o plain and substantial error" in the admission of the defendant's confession, even though the defendant was not advised of the right to have counsel present during questioning. *United States* v. *Rizzo*, 418 F.2d 71, 78 (7th Cir. 1969), cert. denied, 397 U.S. 967 (1970). Because none of the other decisions on which petitioner relies involves the application of the plain error standard, there is no conflict among the circuits warranting review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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